IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1241 OF 2003

Tukaram M. Kesarkar & Anr. .. Petitioners

Versus

Tanubai W/o.Vishnu Karade & Anr... Respondents

Mrs.A.S.Prabhu i/b. S.S.Pakale for petitioners

Mr.Sachin Manale i/b. N.V.Bandiwadekar for respondent No.1.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 12th January 2006.

P.C.

. Heard learned Counsel appearing for petitioners and contesting respondent (respondent

No.1). Respondent No.2 is formal party. Service, therefore, dispensed with.

2. Rule. By consent rule made returnable forthwith.

3. This petition under Article 227 of the Constitution of India challenges an order dated 8th January 2001 passed by Additional Dist.Judge, Gadhinglaj, rejecting application of petitioners in Regular Civil Appeal No.1 of 1999.

4. It is not disputed before me that the said application was moved for condoning delay in bringing legal heirs of the first appellant on record of the civil appeal. Said appellant died on 21st February 1999. Application was filed on 28th September 2000. In the opinion of the learned Additional Dist.Judge, delay in filing application for bringing legal heirs on record is not satisfactorily explained. There is no

sufficient cause for not preferring application within the time stipulated by law to bring legal heirs on record. Taking such a view, Additional Dist.Judge rejected this application. Consequently, appeal also stood dismissed as abated. The order to this effect is passed on 8th January 2001.

5. It appears to be an admitted position that this order was challenged in this Court initially by filing Civil Revision Application, which was entertained inasmuch as Rule came to be issued thereon and further proceedings in execution of the decree passed in favour of first respondent - plaintiff was stayed by this Court. Subsequently, the amendment to C.P.C. necessitated taking a view that the CRA is not maintainable and, therefore, on the ground of maintainability, same was dismissed. It is thereafter that the present writ petiion has been filed.

6. During this entire period viz., from the date of pendency of C.R.A. till today, first respondent has not been able to either execute the decree or take other steps as permissible in law. Similarly, the regular civil appeal also could not be heard. In my view, learned Additional Dist.Judge should have taken a liberal approach in this matter, inasmuch as, the delay in taking out an application for bringing heirs and legal representatives on record has been explained by petitioner No.2 by pointing out that he was unaware of the legal provisions and proceedings. Thereafter, he himself was unwell and was out of town for treatment. It is not as if there is no explanation at all. This is not a matter where it can be said that petitioners were negligent in prosecuting the appeal. In these circumstances, in the larger interest of justice, delay in taking out the application for bringing legal heirs on record of the deceased appellant

No.1, deserves to be condoned. It is accordingly condoned. Petitioners now shall be brought on record as appellants in Regular Civil Appeal No.1 of 1999, provided of course, they pay cost quantified at Rs.2000/- to respondent No.1 within a period of four weeks from today. Upon such cost being paid, the lower court shall allow petitioners to amend the appeal and thereafter decide regular civil appeal No.1 of 1999 on its own merits and in accordance with law, as expeditiously as possible and in any event, within three months from tendering of proof of payment of cost by petitioners. Rule is made absolute in the above terms.

(S.C.DHARMADHIKARI, J)